CALEB DENGU
and
CALEB DENGU FAMILY TRUST
versus
EASTERN & SOUTHERN AFRICAN TRADE & DEVELOPMENT BANK t/a PTA BANK
and
RESERVE BANK OF ZIMBABWE
and
REGISTRAR OF DEEDS N.O

HIGH COURT OF ZIMBABWE
MUSHORE J
HARARE, 15 March 2019 & 4 November 2020

B Mtetwa, for the plaintiffs
Chiuta, for the 1st defendant

Civil Trial: cession of a loan debt

MUSHORE J: The first plaintiff is a Mr Caleb Dengu, who also is a Trustee of the CALEB DENGU FAMILY TRUST. The Trust is cited as the second plaintiff in this matter. The second plaintiff is being represented by the first plaintiff. The 1st defendant (Eastern and Southern Africa Trade and Development Bank (also known as "PTA Bank") 1st Defendant is an international financial institution dealing with and offering financial support to financial institutions in member states; or constituent countries, of which Zimbabwe is such a constituent country. The second defendant is the Central Bank of Zimbabwe. The third defendant is the Registrar of Deeds.

On the 12th June 2001, the first defendant loaned a company known as Onclass Investment Company (Private) Limited the sum of UAPTA585 000.00. Onclass Investment Company Limited had two Directors, other than the first plaintiff. One main conditionfor securing the loan was that the debtors had to put up security for the loans advanced, as is common business practice. The plaintiff and the other Directors agreed to the first defendant's requirement and accordingly they put up various securities on order to be granted the loanfacility.On the part of the plaintiff's the 1st

plaintiff signed a limited personal guarantee; and registered a mortgage bond in the sum of ZW50 million dollars on the 2nd plaintiff's immoveable property described as Stand 731 Glen Lorne Township 15 of lot 41 of Glen Lorne in favour of the 1st defendant to that limit. The Glen Lorne property is the property of the 2nd plaintiff. The Glen Lorne property remains encumbered by the mortgage bond.

The plaintiffs are suing the defendants for the cancellation of the limited mortgage bond registered on the Glen Lorne property; and or alternatively a declaration of rights stating that the property is unencumbered.

The plaintiffs claim for cancellation of the mortgage bond is founded upon the plaintiffs' perception that theyhave already made a tender to the first defendant to extinguish the debt arising from the loan which they were granted by the 1st defendant in terms of the loan agreement; and that such a tender should be taken to mean that they do not owe the first defendant any more money. According to the plaintiffs, the plaintiffs' made such a tenderto the 1st defendant, pursuantto obtaining an order from this courtin their favour, in an unopposed application in another matter case number HC1791/2006. The reason why the plaintiffs and the other members of Thirdline/Onclass instituted that application (HC1791/2006); arose from their conviction that the loan could be paid back in Zimbabwe Dollars and thus they sought an order from the court to deem the loan to be payable in Zimbabwe Dollars. In that matter the other two applicants who were Banterbury Estate (Pvt) Ltd; and Artwell Seremani were the two other debtors to the loan from the PTA Bank; and the first respondent was Eastern and Southern African Trade Development Bank (PTA BANK"). The relief being sought by the applicants in that matter was that of a *mandamus* for the 1st defendant (in the present matter) to accept payment of the loan in Zimbabwe dollars. The court sitting on the 10th May 2006, gave the following order on the unopposed roll:

> "IT IS ORDERED THAT:
>
> 1. Against payment in the currency of Zimbabwe Dollars of such sums as are currently due to the first respondent:
>   1.1 By the first applicant under mortgage bond ……
>   1.2 By the second applicant under mortgage number 11422/2001 hypothecating the immovable property called stand 731 Glen Lorne Township 15 of Lot 41 of Glen Lorne in the district of Salisbury held under Deed of Transfer 11317/2001.
>   1.3 By the third applicant under mortgage bond… respectively, first respondent shall take all steps as are necessary to effect cancellation of the said mortgages and to return to the applicants their title deeds.

2. The respondents bear the costs of this application"

The effect of the order was to allow the plaintiffs and the other two applicants to make a tender of payment of the loan **in the Zimbabwe Dollars equivalent of UAPTA 585 000-00**.

In their declaration, the plaintiffs pleaded that the parties had jointly entertained the notion that by registering the mortgage bond that the mortgaged sum of ZW50 million represented the full extent of the 2nd plaintiff's liability to the 1st defendant.

In its plea, the 1st defendant denied that it was ever intended by the parties, that the amount secured by the mortgage bond (50 million dollars) on the Glen Lorne property. represented the plaintiff's total l extent of the plaintiffs' indebtedness to the 1st defendant. Meanwhile, the plaintiffs contend that the consequences of the 1st defendant denying that the tender of 50 million Zimbabwe dollars represent what they deem to be the full extent of their loan obligation towards the second defendant; and that the second defendant's refusal to accept a tender of 50 Million Zimbabwe dollars, constitutes an act of waiver by them of a claim for repayment of the debt in foreign currency.

Be that as it may it remains clear that after the order was granted in HC 1971/2006, the matter was not resolved. This is because the first defendant's case remains that it is owed payment in the amount and currencyof the amount loaned to ONCLASS; that being an amount stated in foreign currency.

DEFENDANTS' CASE

The defendants' case rests upon the interpretation of the terms of the loan agreement. It is the defendants' case that when the plaintiff's mortgage bond was registered against second plaintiff's Glen Lorne property; and thereafter when title deed for that property was handed to the second respondent as part security for the loan; it was done on the understanding that in the event of non-repayment of the loan the security/i.e., the securities mortgaged in favour of the PTA Bank by members of ONLINE would become immediately executable in terms of section 8.1 of the agreement. To that extent, the respondents are contesting the plaintiffs' claimthat the loan was repayable in ZW Dollars. The defendants insist that when the loan was called in, the second plaintiff's Mortgage Bond became executable in UAPTA Dollars because it secured a loan which had been advanced in UAPTA dollars.

Thus the present matter turns upon resolving the currency to be applied for repayment of the loan and whether it can be concluded that the mortgage bond registered in ZW Dollars was done to alter the meaning of "Dollars" and thus changed the currency for repayment to ZW Dollars, as opposed to UAPTA or US Dollars.

Pleadings were filed in the ordinary course of a defended matter leading to the holding of a Pre-Trial Conference; from which the parties agreed that the issues to be determined by this court be as follows:

A. <u>ISSUES</u>

1. Whether the tender of payment made by the Plaintiffs to the 1st defendant constituted a valid legal action which discharged their obligations to the 1st Defendant?
   1.1 What was the effect of the tender of payment by the Plaintiffs to the 1st Defendant?
2. Whether there was a valid cession of Onclass' indebtedness to the 2nd defendant [RESERVE BANK]?

2.1. If the cessionwas not advised to the Plaintiffs, whether they had any obligations to deal with the 2nd Defendant?

3. Whether the 1st and 2nd defendants lodged their claims with the liquidator of Onclass Investments?

   3.1 If not whether the 1st and 2nd defendants can thereafter pursue the plaintiffs.

4. Whether the plaintiff's obligations were limited to the amount of the bond and in the currency of the mortgage bond

   4.1 Whether the mortgage bond is security for any amount denominated in United States Dollars?

5 Whether the Plaintiffs have any obligation to pay the full amount owed by OnclassInvestments in an amount denominated in United States dollar?

   5.1 Whether the Plaintiffs are indebted to the defendants in any amount and how such alleged indebtedness arose?

My determination of those issues against the pleadings and the documents and witness testimony is as follows.

<u>DID THE TENDER OF PAYMENT MADE BY THE PLAINTIFFS DISCHARGE THEIR OBLIGATION TO THE 1ST DEFENDANT IN FULL?</u>

<u>Currency of the loan advanced.</u>

The agreement describes the currency loaned and the currency for repayment. Paragraph 1.2 of the loan agreement defines the PTA loan as follows-

SECTION 1- INTERPRETATION.

1.1 In this agreement, except where the context otherwise requires:

"**The PTA Bank loan**" means the amount in UAPTA Five Hundred Eighty-Five Thousand (UAPTA 585.000) equivalent in various foreign currencies and which shall include any part thereof for the time being outstanding of all moneys advanced by PTA Bank hereunder.

"**UAPTA**" means the Unit of Account of the Preferential Trade Area equal to one Special Drawing Right (SDR) of the International monetary fund"

"**US$"** or "**Dollars**" denotes Dollars in the currency of the United States of America;

"**Currency**" includes the UAPTA

Currency for repayment.

The answer to that question can be ascertained from:

(i) The pleadings in matter number HC 1971/2006 wherein the parties stated certain facts under oath; and

(ii) the loan agreement itself

In HC 1971/2006 the full record of which formed part of the plaintiffs' bundle of documents, the plaintiffs admitted under oath, that they took out the loan from the first defendant in foreign currency and that they accept that the loan was to be paid back in foreign currency. The plaintiffs also admitted that the amount owed to the first defendant was approximately US$400,000-00'. This is what the plaintiffs stated in matter number HC 1971/2006; when they fully associated with the submission made on oath by the 1st applicant (Banterbury Estates) regarding the liability to PTA bank:

6. On 12th June 2001, First Defendant (PTA Bank) and ONCLASS INVESTMENTS (PVT) LTD ("ONCLASS) a company with which the applicants had an association entered into a written agreement of loan in terms of which1strespondent undertook to advance to ONCLASS the equivalent of the sum of UAPTA 585,000-00 ***in foreign currencies ('the loan'***)

The loan document is lengthy and purposes of economy, is not attached hereto.

Suffice it to say that for the purposes of argument, 1st applicant admits that an amount of approximately US$400,000-00 was duly lent and advanced to ONCLASS.

> ONCLASS was not able to effect repayment timeously of the loan and 1st respondent (PTA Bank) has brought proceedings before this Honourable Court for recovery thereof"

Yet in the present matter, and in stark contrast to their earlier sworn testimony, the very same plaintiffs want the court to believe that the loan was repayable in Zimbabwe dollars. The latter stance adopted by the plaintiffs cannot be reconciled with the repayment currency clearly mentioned in the loan agreement itself. For when reading the loan agreement itself, its terms are unequivocal in that the plaintiff and the other two borrowers applied for and were advanced UAPTA dollars payable in foreign currencies together with 16% interest.

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> "**UAPTA**" means the Unit of Account of the Preferential Trade Area equal to one Special Drawing Right (SDR) of the International Monetary Fund"

The 1st plaintiff acknowledged that the plaintiffs participated in the foreign currency designated loan and drawdown facilities made available to them by the 1st defendant. The loan agreement was the main document produced by the plaintiffs upon which they proposed they had *causa* in the present matter. The loan agreement shows that the plaintiffs bound themselves to pay any amounts loaned to them in foreign currency. For example, clause 4.1(2) of the agreement specifies that:

> "SECTION 13-PAYMENTS FALLING DUE TO PTA BANK
> 13.1 Every sum falling due to PTA Bank shall be denominated in the currency of disbursement and shall be paid in that currency into an account in the name of PTA Bank in such Bank as may from time to time be advised in writing. Save for the extent (if, any) that PTA Bank may at any time and from time to time otherwise notify the Borrower in writing, no obligation of the Borrower to pay any such sum to PTA bank in the aforesaid currency and place shall be deemed to have been discharged or satisfied by any tender made in any other currency or any other place.

It is my view that the plaintiffs cannot be allowed to retreat from an admission which they made under oath in matter HC1971/2006 an extract of which is recorded above. The binding admissionwas part of the impetus behind the decision in that matter and it is apparent from the contents of that affidavit that the plaintiffs have already acknowledged that the loan is repayable in US Dollars to its full extent of the equivalent foreign exchange value of UEPTA 585,000-00 as

at the date when the 1st defendant decided to recall the loan. Section 8 of the loan agreement reads as follows:-

SECTION 8- IMMEDIATE REPAYMENT

> "8.1 Notwithstanding the foregoing provisions of this Agreement, in any of the following events, PTA Bank shall by notice to the Borrower, suspend the right of the Borrower to make withdrawals on account of the PTA Bank Loan or declare the principal amount of the PTA Bank loan then outstanding together with all unpaid interest which has accrued and which is due and payable immediately in which latter case the security or securities issued hereunder shall be come enforceable **and all sums due** by the Borrower to PTA Bank under this agreement shall become payable forthwith notwithstanding anything to the contrary or in the security documents contained"

"**All sums due**" [*bolded over for emphasis*] mean the sum due plus interest; separate from the amount tendered and held as security of the loan agreement)

DID THE PLAINTIFFS' TENDER OF THE VALUE OF THEIR MORTGAGE BOND CONSTITUTE FULL AND FINAL PAYMENT OF THE LOAN?

The agreement itself {see above excerpts} answers this question and clarifiesthe commitment made by the plaintiffs to pay back that the loan and interest in full AND to enforce the securities given. The mortgagebonds merely motivated the first defendant's decision to extend the loan to the plaintiffs. To that end, liquidating the mortgage bond did not in itself fully discharge the plaintiff's obligation toward the first defendant. The wording in the loan agreement specifically allows the first defendant to demand payment in full and reduce the sum owed by liquidating the security bond in its favour. It was never intended by the parties when they signed the loan agreement that the mortgage bond could be taken in isolation as being the sole means of repayment of the loan. The parties did not agree that the enforcement of the securities (in this case the mortgage on the Glen Lorne property) was to be taken as being a full and final payment of the loan agreement itself. The position is thus that the tender of the value of the mortgage bond does not constitute full and final payment of the loaned sums due to the first defendant.

WHAT WAS THE EFFECT OF THE PLAINTIFFS TENDER TO THE FIRST DEFENDANT?

Mr Caleb Dengu was the plaintiffs' sole witness. He was an unsure witness and his evidence was riddled with inconsistencies. He made a very poor impression to the court as a reliable witness; sometimes giving rambling incoherent answers.

Mr Dengu himself admitted that he had no personal knowledge whether ornot the tender of payment which he spoke off as having been made to the second defendant had ever been made. In his own testimony, he thus failed to establish a basis for suing the defendants at all. This was his evidence when he clearly acknowledged that he was unsure if in fact the tender had been made to the Reserve Bank by his lawyers.

Record, pages 17 to 18

"Q. I am just going by what you say in your letter to the Reserve Bank?

A. We paid 50 million dollars to the lawyers. I think it was this question of them not accepting it, Ziumbe (Reserve Bank's lawyers) not wanting it in Zimbabwe dollars. I no longer remember what exactly happened. But the trust tendered to our lawyers and then to Ziumbe, then there was also the question of foreign currency that we cannot accept in Zimbabwe dollars.

Q. So you do not know what was put to the Reserve Bank?

A. **I do not know what was put in the Reserve Bank"**

Thus in giving his testimony, Mr Dengu failed to establish the basis for the plaintiffs claim. The observations made by MATHONSI J [then] in *Railings Enterprises (Pvt) Limited v Dowood Services (Pvt) Limited & Ors* HB 53-16 are reflective of Mr Dengu's posturing on honouring his obligation. The court made the following observation:-

> "Some people simply will not settle a debt. No matter how many times the debtor ruins around the walls of Jericho, the walls remain unshakeable and will not simply fall. So steadfast are they that the debtor would rather spend so much on the legal fees which surpass the amount of the debt owed. It is just in their nature that they incur a debt which they have no intention whatsoever of paying back"

Mr Madera who testified on behalf of the second defendant told the court that the first plaintiff initiated and attended many meetings at the Reserve Bank, in which he promised to produce documents which would prove that he had in fact tendered payment to the first defendant. Mr Madhera told the court that despite his many promises; Mr Dengu did not fulfil such promises. Mr Madhera stated that the debt was never paid. He remained unshaken under cross examination.

Returning to the issue of tender, it is my view, however, that even if the tender had been made and communicated to the defendants; such a communication did not bind the defendants into relinquishing their claim that the loan debt was repayable in foreign currency. The effect of any such tender was ineffectual in discharging the plaintiffs' obligation to the first defendant in full or at all. In fact when looking at the Order of the Court in HC 1971/2006, it was intended that the value of the ZW$50 million be calculated in US dollars first; and then only when that was done

would the value of the Zimbabwe Dollars in foreign currency be made manifest. The useof the words in the Court Order make it clear by specifically stating that

*"1. Against**payment in the currency** of Zimbabwe Dollars of such sums as are currently due to the first respondent:*

1.1

1.2

1.3 By the third applicant under mortgage bond, first respondent shall take all steps as are necessary to effect cancellation of the said mortgages and to return the applicants their title deeds"

The default judgment does not justify the plaintiffs contention that the sum of ZW$ 50 million represented the full sum due by the plaintiffs to the first defendant. A calculation of the value of ZW$50 million dollars would still have to be done against the UEPTA Dollars loaned plus interest, which the first defendant insists are due. I therefore agree with the first defendant that the tender of ZW$ 50 million did not constitute full and final payment of the sums due and thus thetender of the sum guaranteed by the mortgage bond were ineffectual in extinguishing the debt due to the first defendant.

WHETHER THERE WAS A VALID CESSION OF ONCLASS'S INDEBTEDNESS BY FIRST DEFENDANT TO THE SECOND DEFENDANT?

Mrs Lucy Otolo, who flew in from Kenya to give her testimony convicted the court as to the fact that the loan was validly ceded to the second defendant. In fact she stated that she was perplexed that the first defendant had been included in the litigation as an active party, because any rights which the first defendant had held had been ceded to the second defendant. In her evidence in chief, Mrs Otolo gave the following answers:-

Record p 25 (Examination-in-chief)

Q. It is also common cause that the amount that is the subject of the matter was subsequently disbursed to Onclass?

A. It was United States Dollars

Q. What happened subsequent to the disbursement of the money?

A. Subsequent to the, ordinarily Onclass were supposed to discharge its obligations in accordance with the terms of the loan agreement. But Onclass failed to discharge its obligations. Our loan account became delinquent.

Q. Did the bank take any action?

A. The loan became delinquent. I think there are a number of cases between us and Onclass. But ultimately we ceded our rights under a mortgage bond to the Reserve Bank of Reserve Bank of Zimbabwe. So we are actually not sure we are party to this suit because we no longer have anything to do with the defendants"

Mrs Otolo was an impressive witness. She was unflappable and gave her testimony with dignity and with a quiet confidence. Her testimony was flawless. Her opinion was in alliance with the law. In his book, CHRISTIE LAW OF CONTRACT IN SOUTH AFRIC; 7TH Edition at page 537, the learned authorhad this to say on the subject:-

> "A cession..... involves the substitution of a new creditor (cessionary) for the original creditor (cedent), the debtor remaining the same. If the effect of the transaction is not to divest the cedent of the right to sue the debtor, it is not a cession. The cessionary sues on the old contract. Hence our law starts from the general proposition that all rights may be ceded without the debtor's consent"

Meanwhile the plaintiffs' case is that the cession was invalid and therefore the plaintiff is not obligated at law to pay the second defendant anything. Further the plaintiff avers that in order that a cession be regarded as being valid; (and more specifically the cession which the first defendant made transferring its rights in the loanindebtedness to the second defendant) that it is required by the defendants to show that the cession was registered. However the first plaintiff's persistent and direct enquiries to the second defendant show that the plaintiffs accepted the legal propriety of the cession. Exchanges of correspondence between the first plaintiff and the second defendant prove this fact.

I have isolated one letter to give the context of the exchanges between the plaintiffs and the 2nd defendant. In is a letter dated 1st November 2007, Mr Nyabonda of ZITAC, on behalf the plaintiff and addressed to the 2nd defendant, wrote:

> "01 November 2007
>
> Attention Mr Matiza
> Dear Sir
> Re: PTA Bank
> "Thank you for the meeting held at the Reserve Bank of Zimbabwe with Messrs. Saburi and Masoso. We are grateful that the Bank has provided the foreign currency to settle our exposure to PTA Ban. We will be grateful if you can provide the foreign currency to settle our exposure to PTA Bank. <u>We will be grateful if you can provide us with the Zimbabwe Dollar figure in order to arrange the settlement.</u>
>
> As agreed at the meeting we enclose a copy of the Loan Agreement and Sale and Lease Back Agreement on the equipment purchased from the loan.
>
> Please note US$750,000-00 was the loan amount however only US$400,000-00 was drawn down. The documents on the court case are being put together and will be passed onto you.

We wait to hear from you,

Sincerely yours

For and on behalf of Onclass Investments t/a ZITAC

Signed"

It is thus evident that by their conduct and attitude, the plaintiffs recognised that a valid cession had taken place. On page 540 of his book PROFESSOR CHRISTIE propounded that no formalities are necessary for a cession to be regarded as being a valid one when he stated:-

> "In general, no formalities are required for a cession, which may validly bemade orally or tacitly, even if the rights ceded form part of a written contract. The cessionary of a principal debt, payment of which is secured by a surety, acquires rights in respect of suretyship by reason if the cession, a formal cession of the rights against the surety being unnecessary. Since notice of the cession to the principal debtor is not a pre-requisite for the validity of the cession, so too,, notice to the surety is not a pre-requisite for the cessionary acquisition of the rights against the surety... if the intention is to cede is genuine and the motive or purpose is not unlawful, immoral or against public policy, the cession will be valid. Notice to the debtor is not necessary to effect a valid cession"

Also see the case of *Larry Makamadze v Marmak (Private) Limited* v *Jacinth and Associates* HH 658/14.

Section 51 of the Deeds Registry Act [*Chapter20:05.*] infers that the registration or non-registration of the cession is not an act antecedent to its being legally binding upon a transferor and transferee of ceded rights. Section 51 of the Deeds Registry Act allows for the cession of the rights in a mortgage bong from the first defendant (transferor) to the second defendant (transferee), without the sanction of the plaintiffs. S 51 states as follows:

51 Substitution of debtor in respect of bond

> "(1) If the owner (in this section referred to as the transferor) of land which is hypothecated under a registered mortgage bond, not being a person referred to in paragraph (*b*) of the proviso to subsection (1) of section *fifty*, has agreed to transfer to another person the whole of the land and has not reserved any real right in such land. The registrar may register the transfer and substitute the transferee for the transferor as debtor in respect of the bond if there is produced to him, in duplicate, the written consent of the holder of the bond and the transferee to the substitution of the transferee for the transferor as the debtor in respect of the bond.
> (2) In registering the transfer the registrar shall—
> (*a*) make in the appropriate register—
> (i) an entry setting forth that the debt of the transferor secured by the bond is cancelled; and
> (ii) an entry setting forth that the transferee has become the debtor in respect of the bond;
> and
> (*b*) annex one duplicate of the written consent referred to in subsection (1) to the bond and file the other with the registry duplicate thereof; and
> (*c*) endorse upon the bond—

(i) the name of the transferee; and
(ii) the date and number of the transfer; and
(iii) a reference to the said written consent; and
(iv) that the transferee has been substituted for the transferor as debtor in respect of the bond;

and

(*d*) make on the transfer deed an endorsement of mortgage containing the date and number of the bond and the amount due in terms thereof.

(3) As from the date of the transfer deed the transferor shall be absolved from any obligation secured by the bond and the transferee shall be substituted for him as the debtor in respect of such bond and shall be bound by the terms thereof in the same manner as if he had himself passed the bond and had renounced therein the benefit of the exceptions stated therein.

(4) Subsections (1) to (3) shall apply, *mutatis mutandis*, to a real right in land, other than the ownership thereof, which is hypothecated under a registered mortgage bond."

The third defendant stated that it was satisfied that it could substitute the debtor after having received proof that the second defendant had remitted and paid the first defendant the value of the loan and identified the proof of transfer of US$500 000.00 for credit to the first defendant by it by producing the actual payment receipt for the US$500 000.00. ([Exh "2" p 82]

In the light of the above, it is my finding that the cession of the debt by the 1st defendant to the second defendant was valid.

WHETHER THE 1ST AND 2ND DEFENDANTS LODGED THEIR CLAIM WITH THE LIQUIDATOR.

It is common cause that Onclass went into full liquidation around 2011. The cession had taken place by that date thus the question pertains only to the actions of the 2nd defendant. During the trial of the matter, a Mr Madera from the 2nd defendant testified that the 2nd defendant did in fact lodge a claim with the liquidator, and was assured by the liquidator that the 2nd defendant is a secured creditor. The reason why this issue was tabulated was that the plaintiff was alleging that if no claim as filed by the defendants that gave rise to the notion that the defendants had waived their rights to recover the loan debt from the liquidated company. However, a waiver does not come into play simply because a claim was lodged with the liquidator.

Ultimately, and given all of the oral and documentary evidence, the defendants cases are fully supported by the law. In the result,the plaintiffs have not proved their entitlement to the remedy of cancellation of the mortgage.

I therefore rule as follows:

"Plaintiff's claim is dismissed with costs."

Mtetwa & Nyambirai, plaintiff's legal practitioners
Ziumbe & Partners, 1st defendant's legal practitioners
Chinamasa, Mudimu & Maguranyanga, 2nd defendant's legal practitioners